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BYTON NORTH AMERICA CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

EDAG ENGINEERING GMBH,

Petitioner,

vs.

BYTON NORTH AMERICA
CORPORATION,

Respondent.

Case No. 3:21-cv-04736-EMC

**RESPONDENT BYTON NORTH
AMERICA CORPORATION'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
PETITIONER EDAG ENGINEERING
GMBH'S MOTION TO CONFIRM
ARBITRATION AWARD AND ENTER
JUDGMENT**

***[SUPPORTING DECLARATION OF
KEITH A. SIPPRELLE SUBMITTED
CONCURRENTLY HEREWITH]***

Date: December 9, 2021
Time: 1:30 p.m. (Zoom)

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Respondent BYTON NORTH AMERICA CORPORATION (“Byton”) hereby respectfully opposes the Motion of Petitioner EDAG Engineering GMBH (“EDAG”) to Confirm Arbitration Award and Enter Judgment (“Motion”).

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY.¹

A. The Arbitration Proceeding.

The underlying arbitration proceeding was commenced on October 22, 2019 by EDAG submitting a Demand for Arbitration (“Demand”) to JAMS. The Demand asserted claims against Byton for breach of contract and breach of the covenant of good faith and fair dealing premised upon Byton’s purported failure to pay EDAG amounts allegedly owed pursuant to the terms of the parties’ Technology Development and License Agreement (the “TDLA”).² The Demand sought a money recovery from Byton of at least \$28.5 million, but made no claim relating to the ownership of any work product or intellectual property developed by EDAG for Byton. (Sippelle Declaration at ¶ 2, and Exhibit “1” to the Sippelle Declaration at page 3.)

On November 19, 2019, Byton submitted a response to the Demand, and also asserted counterclaims against EDAG for breach of contract and negligence. Byton’s response and counterclaims made no reference to the ownership of any work product or intellectual property developed by EDAG for Byton pursuant to the TDLA. (Sippelle Declaration at ¶ 3, and Exhibit “2” to the Sippelle Declaration.)

On December 16, 2019, EDAG submitted a response and affirmative defenses to Byton’s cross-claims. EDAG’s response made no reference to the ownership of any work product or intellectual property developed by EDAG for Byton pursuant to the TDLA. (Sippelle Declaration at ¶ 4, and Exhibit “3” to the Sippelle Declaration.)

¹ Unless otherwise indicated, the factual statements in this Memorandum are supported by the Declaration of Keith A. Sippelle submitted concurrently herewith (“Sippelle Declaration”), including the exhibits thereto. The exhibits referenced in this Memorandum are the exhibits to the Sippelle Declaration, unless otherwise indicated

² The Demand is attached as Exhibit “1” to Sippelle Declaration. The TDLA is attached as Exhibit “A” to the Demand.

1 Subsequently, Judge William J. Cahill (Ret.) of JAMS was appointed as arbitrator in this
 2 matter (the “Arbitrator”), in accordance with paragraph 14.4b of the TDLA. (Sipprelle
 3 Declaration at ¶ 5.)³

4 The case was tried to the Arbitrator between February 8 and 19, 2021. (Sipprelle
 5 Declaration at ¶ 6; Exhibit “4” to the Sipprelle Declaration, at p. 1.) The Final Arbitration Award
 6 was issued on June 2, 2021 and served on the parties on June 3, 2021. (Exhibit “4” to the
 7 Sipprelle Declaration, pp. 28, 29.) The Final Arbitration Award addressed and resolved all issues
 8 raised by the parties in their pleadings and otherwise.⁴ The Final Arbitration Award made no
 9 findings regarding (or even mention of) the ownership of any intellectual property developed by
 10 EDAG for Byton pursuant to the TDLA. (See Exhibit “4.”) This was hardly surprising, as the
 11 ownership of the work product created by EDAG for Byton was not raised by the pleadings (see
 12 Exhibits “1,” “2” and “3”), and no evidence or argument was presented during the course of the
 13 arbitration hearing in February 2021 regarding the ownership of this work product. (Sipprelle
 14 Declaration at ¶ 6.)

15 On June 23, 2021, EDAG filed a petition to confirm the Final Arbitration Award in the
 16 United States District Court for the Northern District of California. (DE 1.)

17 **B. EDAG’s Motion For Issuance Of A Preliminary Injunction.**

18 On Sept 24, 2021, more than 3 months after EDAG had filed its petition to confirm the Final
 19 Arbitration Award, EDAG filed a Motion with the Arbitrator seeking the issuance of a Preliminary
 20 Injunction against Byton.⁵ EDAG’s Motion for Preliminary Injunction was premised on a new
 21 and unadjudicated claim that the work product/intellectual property that EDAG had created for
 22

23
 24 ³ See also p. 2, ¶ 1 of the Final Arbitration Award, which is attached as Exhibit “4” to the
 25 Sipprelle Declaration. The Final Arbitration Award is also Docket Entry (“DE”) 10-4 in this
 action.

26 ⁴ See Exhibit “4” at p. 2, ¶ 2: “The Arbitrator has considered *all* pleadings, testimony, and
 27 exhibits and makes the following findings of facts and law.” (Emphasis supplied.)

28 ⁵ EDAG’s Memorandum of Points and Authorities in support of its Motion for Preliminary
 Injunction is attached as Exhibit “5” to the Sipprelle Declaration.

1 Byton and for which Byton had paid EDAG approximately €27 million (more than 50% of the
 2 contract price), belonged entirely to EDAG because Byton had failed to pay EDAG the full
 3 amount owed under the TDLA. (Sippelle Declaration at ¶ 9; Exhibit “5” to the Sippelle
 4 Declaration at 6:9-9:17, 8:28-9:2, 14:19-20.) On the basis of this new contract-based claim,
 5 EDAG sought a preliminary injunction to preclude Byton from transferring (or even accessing)
 6 this work product. EDAG also sought a general “freeze” on Byton’s other assets up the amount of
 7 the arbitration award. (Sippelle Declaration at ¶ 9; Exhibit “6” to the Sippelle Declaration at
 8 page 9.)

9 On October 29, 2021, while the Motion for Preliminary Injunction was still pending with the
 10 Arbitrator, EDAG filed the instant Motion with this Court to confirm the Arbitrator’s June 2, 2021
 11 Final Arbitration Award and Enter Judgment on the Award. (DE 19.) The Motion for
 12 Confirmation was accompanied by a proposed Order and Judgment. (DE 19-5.)

13 On November 7, 2021, the Arbitrator issued a ruling granting EDAG’s Motion for
 14 Preliminary Injunction. (Exhibit “7” to the Sippelle Declaration.) EDAG filed a notice of the
 15 ruling with this Court on November 8, 2021. (DE 25.) The central finding supporting the
 16 Arbitrator’s November 7, 2021 ruling was that EDAG owns the work product/intellectual property
 17 developed by EDAG for Byton pursuant to the TDLA (and for which Byton paid EDAG
 18 approximately €27 million of the €50 contract price). (Sippelle Declaration at ¶ 11; Exhibit “7”
 19 to the Sippelle Declaration.) The following passages from the Arbitrator’s November 7, 2021
 20 ruling make this clear:

- 21 • Under the TDLA, “BYTON may only to [sic] receive intellectual property rights by
 22 paying EDAG. BYTON now has access to intellectual property it does not own, and for
 23 which it has not paid.” (Exhibit “7” at p. 4.)
- 24 • “BYTON has no right to the intellectual property in question, because BYTON breached its
 25 obligation to pay EDAG for it.” (Exhibit “7” at pp. 5-6.)
- 26 • “BYTON’s unauthorized access and transfer of EDAG’s property constitutes a form of
 27 trespass, for which there is no adequate monetary compensation.” (Exhibit “7” at p. 6.)
- 28 • “BYTON has no protectable interest in being permitted to misappropriate EDAG’s

1 intellectual property.” (Exhibit “7” at p. 7.)

2 The Arbitrator’s central finding in his ruling of November 7, 2021 that EDAG rather than
 3 Byton owns 100% of the work product that EDAG created for Byton and for which Byton paid
 4 EDAG more than 50% of the contract price is an entirely new, different and highly significant
 5 finding relating to the interpretation and the parties’ performance under the TDLA that was neither
 6 framed by the arbitration pleadings, a subject of the nine-day Arbitration hearing in February
 7 2021, or referenced in the June 2, 2021 Final Arbitration Award. This significant new and
 8 different finding, which is based on an interpretation of paragraph 6.2 of the TDLA and the
 9 parties’ performance thereunder, is in effect a significant modification of the Arbitrator’s Final
 10 Award. Byton intends to challenge this finding through a motion to vacate, modify, or correct the
 11 award (under 9 U.S. Code § 12) on the grounds that: (a) the Arbitrator exceeded his powers in
 12 making this substantive finding in his ruling issued on November 7, 2021 - more than three
 13 months after issuing his Final Award (9 U.S. Code § 10(a)(4)); and (b) in making a finding on
 14 November 7, 2021 regarding ownership of the work product/intellectual property, the Arbitrator
 15 improperly modified his June 2, 2021 Final Award based upon a substantive matter not submitted
 16 to him for decision prior to entry of the Final Award (9 U.S. Code § 9(b)).

17 Because the June 2, 2021 Final Award has effectively been amended as of November 8,
 18 2021 (the date that the Arbitrator’s ruling of November 7, 2021 was served on the parties), Byton
 19 must be given an opportunity to challenge the amended final award. Under 9 U.S. Code § 12,
 20 Byton has 90 days from November 8, 2021 in which to challenge the amended award by way of a
 21 motion to vacate, modify, or correct the award. Because Byton’s deadline to challenge the
 22 amended final award will not run until February 7, 2022, it would be premature for this Court to
 23 confirm the arbitration award and enter judgment thereon.

24 **C. EDAG’s Overreaching Amended Proposed Order And Judgment.**

25 At 5:03 p.m. on November 9, 2021, only three days before Byton’s opposition to the instant
 26 Motion was due, EDAG submitted an amended proposed order and judgment to this Court [DE
 27 26]. Although EDAG’s counsel had represented to the Court at the Case Management Conference
 28 several hours earlier that its amended proposed order and judgment would merely incorporate the

1 Arbitrator's ruling of November 7, 2021 granting EDAG's motion for preliminary injunction,
 2 EDAG's amended proposed order and judgment contains provisions that dramatically differ from
 3 and fundamentally alter the Arbitrator's ruling of November 7, 2021. (Sippelle Declaration at ¶
 4 12.)

5 The Arbitrator's order of November 7, 2021 was a prohibitory injunction intended to
 6 preserve the *status quo* while EDAG sought to collect on any judgment it was eventually awarded:

7 “EDAG has demonstrated that it is entitled to entry of an injunction, to preserve the status
 8 *quo without imposing any affirmative duty on BYTON or prohibiting BYTON from any*
 9 *action it is entitled to undertake.*”

10 (Exhibit “7” at p. 6; emphasis supplied.)

11 In contrast to the Arbitrator's November 7, 2021 Order, EDAG's amended proposed order
 12 and judgment is replete with provisions that were not included in the Arbitrator's November 7,
 13 2021 Order, including provisions requiring Byton to take *affirmative actions* upon threat of fines
 14 and contempt. Some of the more overreaching provisions of EDAG's amended proposed order
 15 and judgment are the following:

- 16 • “Within 5 (five) days of entry of this judgment, BYTON shall return to EDAG any and all
 17 copies of the intellectual property EDAG created and provided in conjunction with
 18 BYTON's “M-BYTE” vehicle prototype. Upon return to EDAG, BYTON shall destroy
 19 any such copies of the intellectual property in its possession and subject to inspection.”
 20 [DE 26, Amended Proposed Order, page 3, lines 20-22.]
- 21 • “Finally, the Court finds that EDAG has shown that BYTON has made efforts to transfer
 22 assets offshore, leaving BYTON North American with only debt, and otherwise to avoid
 23 payment of a judgment in EDAG's favor.” [DE 26, Amended Proposed Order, page 4,
 24 lines 7-9.]
- 25 • “For every day that BYTON fails to comply with the above provisions, BYTON may be
 26 subject to being held in contempt and assessed penalties of \$50,000 per day and any
 27 attorney's fees incurred by EDAG in a contempt proceeding.” [DE 26, Amended Proposed
 28 Order, page 4, lines 4-6, 16-18.]

- 1 • “Within 5 (five) days of entry of this judgment, Respondent BYTON North America
2 Corporation, a Delaware corporation (hereafter “BYTON”) shall return to EDAG any and
3 all copies of any and all intellectual property created by EDAG.” [DE 26, Amended
4 Proposed Judgment, page 1, lines 16-19.]
- 5 • “Upon return to EDAG, BYTON shall destroy any such copies of the intellectual property
6 in its possession.” [DE 26, Amended Proposed Judgment, page 1, lines 20-21.]
- 7 • **“NOTICE TO JUDGMENT DEBTOR: If you fail to comply with the Judgment and
8 Orders therein as specified above, you may be subject to: being held in contempt
9 under California Code of Civil Procedure Sections 1218(a) and 1219(a), and 18 U.S.C.
10 §§ 401 et seq.; and the inherent powers of the Court, which include arrest and
11 punishment for contempt of court. The Court may impose daily penalties of \$50,000
12 per day, each day, and the Court may make an order requiring you to pay the
13 reasonable attorney’s fees incurred by the judgment creditor in this proceeding.”** [DE
14 26, Amended Proposed Judgment, page 2, lines 1-8, page 3, lines 1-8.]

15 In effect, EDAG’s amended proposed order and judgment would seek to convert the
16 Arbitrator’s prohibitory injunction of November 7, 2021 intended to preserve the *status quo* into a
17 mandatory injunction requiring Byton to return unspecified and undefined “intellectual property”
18 and pay the full amount of the judgment upon threat of: (a) arrest and punishment for contempt of
19 court; and (b) the imposition of daily penalties of \$50,000 per day.

20 Moreover, EDAG’s amended proposed order and judgment improperly seeks to “bootstrap”
21 the arbitrator’s November 7, 2021 finding that EDAG owns the work product/intellectual property
22 developed by EDAG for Byton pursuant to the TDLA into an order requiring Byton to return this
23 work product/intellectual property under threat of contempt and arrest before Byton has had an
24 opportunity to challenge the arbitrator’s finding by way of a motion to vacate, modify, or correct
25 the arbitration award under 9 U.S. Code § 12.

26 As discussed below, EDAG’s overreaching amended proposed order and judgment should
27 be rejected on the basis that it contains provisions that are both unlawful and beyond the scope of
28 the Arbitrator’s November 7, 2021 ruling.

1 **II. CONFIRMATION OF THE ARBITRATION AWARD AND ENTRY OF**
 2 **JUDGMENT THEREON WOULD BE PREMATURE IN LIGHT OF THE**
 3 **ARBITRATOR’S NOVEMBER 7, 2021 MODIFICATION OF THE AWARD.**

4 The Arbitrator’s November 7, 2021 Order is premised upon a finding relating to the
 5 interpretation and the parties’ performance under the TDLA that was not framed by the arbitration
 6 pleadings, was not a subject of the nine-day Arbitration hearing in February 2021, and is not
 7 referenced in the Arbitrator’s Final Award of June 2, 2021. This significant new and different
 8 finding (that EDAG owns 100% of the work product/intellectual property developed by EDAG for
 9 Byton pursuant to the TDLA, and for which Byton paid EDAG approximately €27 million of the
 10 €50 contract price), constitutes a modification of the Arbitrator’s Final Award.⁶

11 Whether Byton’s 90-day deadline to move to vacate, modify, or correct the arbitration award
 12 under 9 U.S. Code § 12 runs from June 3, 2021 (the date of service of the Final Arbitration
 13 Award) or November 8, 2021 (the date of service of the Arbitrator’s November 7, 2021 ruling)
 14 will turn on whether the Arbitrator’s substantive finding in his November 7, 2021 ruling that
 15 EDAG owns 100% of the work product/intellectual property developed by EDAG for Byton
 16 pursuant to the TDLA resolved an “arbitrable claim” as distinguished from a mere subsidiary
 17 determination of the claims that were resolved in the June 2, 2021 Final Award. *See Fradella v.*
 18 *Petricca* (1st Cir. 1999) 183 F.3d 17, 19. As the First Circuit explained in *Eastern Seaboard*
 19 *Construction Co., Inc. v. Gray Construction, Inc.* (1st Cir. 2008) 553 F.3d 1, “[o]ur cases still tend
 20 to differentiate between a second award which is ‘fundamentally inconsistent with the first award’
 21 and one which ‘simply flesh[es] out the remedy announced initially.’ *Id.* at 4. Thus, the *Eastern*
 22 *Seaboard* Court found that Rule 47 of the AAA Construction Industry Arbitration Rules permitted
 23 the arbitrator to modify the initial omission of a \$ 66,613.89 because doing so was “the type of

24 _____
 25 ⁶ Lest there be any doubt as to whether this aspect of the Arbitrator’s November 7, 2021 ruling
 26 constitutes a significant modification of the Final Arbitration Award, the Court need look no
 27 further than EDAG’s amended proposed order and judgment [DE 26], which incorporates in
 28 multiple provisions the Arbitrator’s November 7, 2021 finding that EDAG owns 100% of the
 intellectual property developed by EDAG for Byton pursuant to the TDLA.

1 ‘clerical, typographical, technical or computational error’” which AAA Rule 47 permitted the
 2 Arbitrator to amend or clarify. The amendment did not reopen the merits of the case. Rather, it
 3 clarified a latent ambiguity.” *Id.* at 6.

4 Here, the Arbitrator’s finding in his November 7, 2021 ruling that EDAG owns 100% of the
 5 work product/intellectual property developed by EDAG for Byton pursuant to the TDLA was not
 6 a mere “subsidiary” determination of the claims that were resolved in the June 2, 2021 Final
 7 Award, nor was this determination simply the correction of a clerical, typographical, technical or
 8 computational error made in the June 2, 2021 Final Arbitration Award. Instead, the finding in the
 9 Arbitrator’s November 7, 2021 ruling that EDAG owns 100% of the work product/intellectual
 10 property developed by EDAG for Byton pursuant to the TDLA was in effect a ruling on a brand-
 11 new legal theory that had not been part of the arbitration proceedings up through and including the
 12 issuance of the Final Arbitration Award on June 2, 2021. By ruling on a new substantive contract
 13 claim that could have been (but was not) asserted in the arbitration proceedings prior to the
 14 issuance of the Final Arbitration Award (*e.g.*, by way of a claim that Byton had trespassed upon
 15 and/or converted property owned by EDAG), the Arbitrator effectively reopened the arbitration
 16 proceedings to address a substantive new claim.⁷

17
 18
 19
 20 ⁷ The situation presented here is in contrast to the facts presented in *Parsons, Brinckerhoff,*
 21 *Quade & Douglas, Inc. v. Palmetto Bridge Constructors* (U.S.D.C, District of Maryland, 2009)
 22 647 F. Supp. 2d 587. In *Parsons*, the Petitioner (Parsons) argued that the three-month limitations
 23 period under 9 U.S. Code § 12 began to run on December 1, 2008, the date of the final arbitration
 24 award, and consequently the motions filed by the Respondent (Palmetto) in April 2009 to modify
 25 or correct the arbitration award were untimely. In contrast, Palmetto argued that the three-month
 26 limitations period under 9 U.S. Code § 12 began to run on January 19, 2009, the date of the
 27 issuance of the arbitrators’ “Order in Response to Requests for Modification of Final Award and
 28 Amendment of Final Award by Interlineation,” and consequently the motions filed in April 2009
 to modify/correct the arbitration award were timely. The District Court concluded that the three-
 month limitations period under 9 U.S. Code § 12 began to run on December 1, 2008, because the
 January 19, 2009 modifications of the final award were simply computational amendments of the
 December 1, 2008 final award, and therefore constituted the resolution of a “subsidiary matter.”
Id. at 591-594.

1 In short, because the Arbitrator's November 7, 2021 ruling addressed and resolved a new
 2 and distinct arbitrable claim, Byton's 90-day deadline to challenge the final arbitration award runs
 3 from November 8, 2021 (the date of service of the Arbitrator's November 7, 2021 ruling). As
 4 Byton's deadline to vacate, modify, or correct the arbitration award under 9 U.S. Code § 12 does
 5 not run until February 7, 2021, it would be premature for this Court to rule on EDAG's Motion.

6 **III. EDAG'S OVERREACHING PROPOSED AMENDED ORDER AND**
 7 **JUDGMENT SHOULD BE REJECTED.**

8 Although the Court need not address the propriety of EDAG's amended proposed order and
 9 judgment [DE 26] in the event the Court agrees with Byton that it would be premature to rule on
 10 EDAG's Motion, Byton nevertheless feels it must address and object to the grossly inappropriate,
 11 obnoxious and overreaching aspects of the document that EDAG has requested this Court approve
 12 and adopt.

13 The Arbitrator's ruling of November 7, 2021 was a prohibitory injunction intended to
 14 preserve the *status quo* while EDAG sought to collect on any judgment it was eventually awarded.
 15 The Arbitrator's ruling did not impose any affirmative duty on Byton or prohibit Byton from any
 16 action it was entitled to undertake. (Exhibit "7" at p. 6.) In contrast to the Arbitrator's November
 17 7, 2021 order, EDAG's amended proposed order and judgment is replete with provisions that were
 18 not included in the Arbitrator's November 7, 2021 ruling, including provisions finding that Byton
 19 has essentially engaged in efforts to fraudulently transfer assets (DE 26, Amended Proposed
 20 Order, page 4, lines 7-9) and requiring Byton to take *affirmative actions* (e.g., return of work
 21 product/intellectual property, destroying copies of intellectual property, payment of the judgment)
 22 upon threat of \$50,000 daily fines, contempt and arrest. (DE 26, Amended Proposed Order, page
 23 3, lines 20-22; DE 26, Amended Proposed Order, page 4, lines 4-6, 16-18; DE 26, Amended
 24 Proposed Judgment, page 1, lines 16-19; DE 26, Amended Proposed Judgment, page 1, lines 20-
 25 21; DE 26, Amended Proposed Judgment, page 2, lines 1-8, page 3, lines 1-8.]

26 Under federal law (which EDAG contends applies to its Motion), a money judgment must
 27 be enforced through a writ of execution. *Federal Rule of Civil Procedure* ("FRCP") 69(a)(1).
 28 Although *FRCP* 70 authorizes a federal court to use its contempt power enforce a judgment for

1 certain specific acts, these do not include a judgment for the payment of money. *See Whittaker*
 2 *Corp. v. Execuair Corp.* (9th Cir. 1992) 953 F.2d 510, 516 (money judgments may not be
 3 enforced by imposition of contempt sanctions).⁸ *See also Shuffler v. Heritage Bank* (9th Cir.
 4 1983) 720 F.2d 1141, 1147-1148 (federal courts are not permitted to enforce money judgments by
 5 contempt or methods other than writ of execution except in cases where established principles so
 6 warrant);⁹

7 If and when the Court has occasion to address EDAG's amended proposed order and
 8 judgment, Byton respectfully requests that the Court strike or amend those provisions that are
 9 unlawful, go beyond the scope of the Arbitrator's November 7, 2021 ruling, or suffer from other
 10 deficiencies.¹⁰

11 _____
 12 ⁸ Debtor's prisons were abolished under federal law in 1833. Moreover, incarcerating indigent
 13 debtors is unconstitutional under the Fourteenth Amendment's Equal Protection clause. *Bearden*
 14 *v. Ga.* (1983) 461 U.S. 660.

15 ⁹ "First, to the extent the fine was intended to force Shufflers to pay the \$ 190,000 to Heritage, the
 16 fine is unauthorized under Rule 70. The proper means for Heritage to secure compliance with a
 17 money judgment is to seek a writ of execution, not to obtain a fine of contempt for the period of
 18 non-payment. We recognize that Rule 69(a), by stating that 'process to enforce a judgment for the
 19 payment of money shall be a writ of execution, *unless the court otherwise directs*,' Fed. R. Civ. P.
 20 69(a) (emphasis added), seemingly leaves open the possibility of securing payment of a money
 21 judgment through the imposition of a contempt sanction. Nonetheless, we do not interpret the
 22 exception to execution to permit a federal court to 'enforce a money judgment by contempt or
 23 methods other than a writ of execution, except in cases where established principles so warrant.'
 24 See 7 J. Moore & J. Lucas, *Moore's Federal Practice* P69.03[02] (2d ed. 1982); see *Gabovitch v.*
Lundy, 584 F.2d 559, 560 n.1 (1st Cir. 1978) ("equitable remedies, even those permitted by Rule
 70, are seldom appropriate aids to execution of a money judgment"); *Governor Clinton Co. v.*
Knott, 120 F.2d 149, 153 (2d Cir.), cert. dismissed per stipulation, 314 U.S. 701, 62 S. Ct. 50, 86
 L. Ed. 561 (1941). Heritage points to no exceptional circumstances or established principles in this
 case permitting Heritage to gain payment of the February judgment by securing a \$500 per day
 fine. Consequently, to the extent the order of contempt was intended to enforce payment, it cannot
 be sustained." *Id.* at 1147-1148.

25 ¹⁰ A non-exhaustive list of other problematic provisions of EDAG's amended proposed
 order and judgment include the following:

26 (1) Byton would be precluded under the amended proposed order/judgment from taking
 27 any step to "transfer" or "otherwise make unavailable" any assets up to the value of the
 judgment. [DE 26, proposed judgment, page 2.] "Transfer" and "otherwise make

1 **IV. CONCLUSION.**

2 For all of the foregoing reasons, EDAG's Motion should be denied.

3 Respectfully Submitted,

4
5 Dated: November 12, 2021

VAN ET TEN SIPPRELLE LLP

6
7 By: Keith A. Sipprelle
8 Keith A. Sipprelle
9 Attorneys for Respondent
10 BYTON NORTH AMERICA CORPORATION

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20 unavailable" are not defined in the document. Do these terms refer only to fraudulent
21 transfers, or to any transfers? If the latter, would Byton be precluded from covering
22 payroll and benefits for its few remaining employees, paying rent, paying its few
23 remaining vendors (including its attorneys), and otherwise paying normal operating
24 expenses?

25 (2) Byton would be required under the amended proposed order/judgment to "return to
26 EDAG any and all copies of the intellectual property created by EDAG" within 5 days,
27 "to destroy any such copies of the intellectual property in its possession," and to refrain
28 from "accessing, modifying, transferring, or deleting any intellectual property created
 by EDAG." [DE 26, proposed judgment, pages 1 and 2.] The term "intellectual
 property" is not defined in the document. How is Byton, with its few remaining
 employees, to determine (within 5 days no less) what is EDAG's "intellectual
 property" and what is not from the mass of electronic data stored on the JAMA cloud
 servers?